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Submitted via regulations.gov

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Michelle Brané
Executive Director
Interagency Task Force on the Reunification of Families
U.S. Department of Homeland Security

RE: Comments in Response to Request for Public Input, DHS-2021-0051, “Identifying Recommendations to Support the Work of the Interagency Task Force on the Reunification of Families”

Dear Ms. Brané,

I am writing on behalf of First Focus on Children to comment in response to the Department of Homeland Security’s (DHS) Request for Input, “Identifying Recommendations to Support the Work of the Interagency Task Force on the Reunification of Families,” published in the Federal Register on December 10, 2021.

First Focus is a bipartisan child advocacy organization dedicated to making children and families the priority in federal policy and budget decisions. As an organization committed to the safety, well-being, and family unity of all children, we work for the family unity of all children whom the government has separated from their parents and caregivers, including children in the immigration system. We immediately condemned the Trump Administration’s family separation policy as child abuse.¹ We are grateful for this opportunity to offer our recommendations to ensure that this cruel practice never occurs again.

While this request for input focuses on the separation of children from their parents and legal guardians, we note that children’s separation from other nonparent caregivers also causes the same level of toxic stress and trauma as separation from a parent.² While focusing this comment on separation from parents and legal guardians, we urge DHS, alongside with its interagency partners at

¹ *Statement: Family Separation is Child Abuse*, First Focus on Children (June 19, 2018), <https://firstfocus.org/news/press-release/statement-family-separation-is-child-abuse>.

² *Key Points: Traumatic Separation and Refugee & Immigrant Children*, The National Child Traumatic Stress Network, https://www.nctsn.org/sites/default/files/resources/tip-sheet/key_points_traumatic_separation_and_refugee_immigrant_children.pdf (last visited Apr. 23, 2021) (noting that a child’s relationships with a primary caregiver is critical to a children’s ability to thrive, and that separation is one of the most potent stressors a child can experience).

the Department of Health and Human Services (HHS), to take steps to minimize the separation of children from their nonparent family members at the border in accordance with applicable law.

To ensure the federal government does not repeat the policies and practices that led to family separation at the border, we urge the Administration to pursue redress and accountability for separated families; issue guidance based on rights to family unity and due process; eliminate all other deterrence-based policies that result in family separation; and put in place standards, processes, and entities to ensure all government policies are based on a “best interests of the child” standard.

I. Pursue redress and accountability for separated families.

We are grateful to the Task Force for the steps already taken to reunify families and provide them with support in the United States, and we support that continued effort until all families are reunified and have sufficient support to heal and rebuild family bonds. Beyond these efforts, the Administration should continue to support permanent protections for families in the form of a pathway to citizenship. Without permanent protections, more families could experience what Maily and her father Antonio faced when ICE separated their family after they were reunified by arresting Antonio.³ A pathway to citizenship would not only provide many families redress but also prevent families from experiencing the trauma of subsequent separation. We thank the Task Force for their efforts to identify a long-term immigration status option for families and urge support of a legislative solution that would provide families a pathway to citizenship.

We urge the Administration to also pursue accountability for the wrongdoing committed during the Trump administration. As we outline below, family unity is a right protected by our Constitution and laws, a right that was violated by the previous Administration. Children and families are still living with the trauma of the government’s actions today—Mateo, a seven-year-old from Guatemala, was separated from his mother for seven weeks and still cannot stand to be apart from her.⁴ Accountability measures, including admitting violations of family integrity in court and providing compensation to families through possible settlement of outstanding family separation damages claims, would help ensure that future Administrations think twice before implementing similar policies that systematically rip children from their parents and legal guardians. What is best for children and their families who have suffered family separation and need healing should be central to government considerations of court settlements and compensation.

II. Issue guidance regarding the processing of children with parents and legal guardians at the border.

The previous Administration implemented its family separation policy by a memorandum⁵ and our government had no countervailing policies or systems related to the processing of family units at the border to prevent such a memorandum from resulting in the prolonged separation of thousands of

³ Kevin Seiff, *Separated at the border, reunited, then separated again: For migrant families, another trauma*, The Washington Post (Jan. 31, 2021), https://www.washingtonpost.com/world/the-americas/family-separations-biden-trump-honduras/2021/01/31/f6b815cc-6198-11eb-9430-e7c77b5b0297_story.html.

⁴ Sean Sullivan and Maria Sacchetti, *Biden Faces Highly Charged Legal Fight with Migrants Whose Children Were Taken Away Under Trump*, The Washington Post (Jan. 4, 2022), https://www.washingtonpost.com/politics/biden-separated-families-migrants/2022/01/04/aba8e4ea-67ef-11ec-a76b-374aeb82e811_story.html.

⁵ U.S. Department of Justice, *Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a)*, Apr. 6, 2018, <https://www.justice.gov/opa/press-release/file/1049751/download>.

families. We recommend that the government issue guidance related to border processing of children with their parents or legal guardians. Such guidance should outline that:

- DHS shall not separate any children from their parent or legal guardian without substantial evidence of imminent harm to the child and determining that there are no other options to keep the child with their parent or legal guardian;
- Determinations regarding family separation shall be made only by state-licensed child welfare professionals, shall be subject to judicial review by a court of competent jurisdiction, and shall require special training of all entities encountering children and families; and
- In the rare situation in which family separation occurs, DHS shall provide notice and due process to children and families.

a. DHS shall not separate any child from their parent or legal guardian apprehended at or near the border unless there is substantial evidence of imminent harm to the child and determining that there are no other options to safely keep the child with their parent or legal guardian.

Family separation is extremely harmful to children’s health and well-being. Children separated from parents, particularly children who have already faced trauma, experience additional toxic stress which results in negative impacts for their mental, physical, and emotional health that could be lifelong.⁶ Physicians for Human Rights (PHR) interviewed families separated during zero-tolerance and concluded the policy met the criteria for torture, given the traumatic responses exhibited by children and their caregivers.⁷ Clinicians who interviewed families noted that children who suffered separation exhibited signs of regression, nightmares, and other sleeping difficulties; frequent crying; and aggression.⁸ Several clinicians pointed out that many children and their caregivers met the diagnostic criteria for post-traumatic stress disorder, major depressive disorder, or generalized anxiety disorder.⁹ PHR stated that to recover from trauma, families required “psychiatric and behavioral health interventions in the context of strong social and family-mediated support.”¹⁰

The harm of family separation is recognized not only in the research, but also in our laws regarding family unity here in the United States. The Supreme Court has held that “the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation’s history and tradition.”¹¹ Based on this finding, the Court has found that there is a constitutional right to family integrity.¹² It is this right that a federal judge relied upon when he ordered the Trump administration to stop its widespread family separation policy.¹³

⁶ Hajar Habbach, Kathryn Hampton, & Ranit Mishori, *You Will Never See Your Child Again: The Persistent Psychological Effects of Family Separation*, Physicians for Human Rights (Feb. 25, 2020), <https://phr.org/our-work/resources/you-will-never-see-your-child-again-the-persistent-psychological-effects-of-family-separation/>.

⁷ *Id.* at 5.

⁸ *Id.* at 21.

⁹ *Id.* at 22.

¹⁰ *Id.* at 24.

¹¹ *Moore v. East Cleveland*, 431 U.S. 494, 503-04 (1977).

¹² *Troxel v. Granville*, 530 U.S. 57, 65, 66 (2000). *See also Quilloin v. Walcott*, 434 U.S. 246, 255, (1978).

This right extends to all parents regardless of their immigration status. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

¹³ *Ms. L v. ICE*, Case No. 18cv0428 DMS (MDD) (S.D. Cal. June 26, 2018).

Other laws and best practices favor family integrity and treat separation as a last resort. While the standard for emergency removal varies from state to state, in many states the standard for a child's emergency physical separation from parents or caregivers is that there must be evidence of imminent harm to the child and exhaustion of all reasonable efforts to prevent removal.¹⁴ This high standard for separation is considered a best practice within the child welfare field.¹⁵ In 2018, Congress passed the Family First Prevention Services Act (FFPSA), one of the most significant pieces of federal child welfare reform in decades, which recognized that removing children from families is traumatic and the child welfare system should instead focus on preventing separation.¹⁶ The FFPSA requires states to make reasonable efforts to prevent a child's removal from their home and allows states to seek federal reimbursement to instead refer families for up to 12 months of family support and stabilization services, including trauma-informed and evidence-based mental health services, substance use treatment, and in-home parent skill training.¹⁷ The FFPSA represents a shift in federal government investment from removing children from their families to keeping children with their families through prevention services.

Given the harm of family separation to children and families' constitutional right to family integrity, DHS should prohibit the separation of any child from a parent or legal guardian unless there is substantial evidence of imminent harm to the child. Where DHS and HHS have a concern about keeping a child with their parent or legal guardian but where that concern does not meet the standard above, DHS and HHS should provide services to the family to maintain family integrity. These services could be provided through community-based case management.¹⁸

Importantly, we note that a parent or legal guardian's criminal history is not sufficient reason for family separation. While a court order ended the formal and widespread family separation policy, the order allowed DHS to continue to separate children in other circumstances, including where parent had a criminal history other than improper entry.¹⁹ According to documents from the *Ms. L v. ICE* litigation on family separation, the government separated over 700 families based on alleged criminal history in the year after the court's June 2018 preliminary injunction.²⁰ As explained earlier, in many states the standard for emergency removal of a child from a parent or legal guardian is a substantial risk of imminent harm to the child. Where a parent or legal guardian's allegations or criminal conviction has no nexus to a parent's ability to care for a child, there is no basis for separation.

¹⁴ Vivek Sankaran et al., *A Cure Worse than the Disease? The Impact of Removal on Children and Their Families*, 102 Marq. L. Rev. 1163, 1172-1173 (2019), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=3055&context=articles>. See, e.g., Tex. Fam. Code Ann. § 262.104(a)(1) (permitting emergency removal only when there is an "immediate danger to the physical health or safety of the child.").

¹⁵ American Bar Association House of Delegates, Family Integrity Policy 10 (Aug. 2019), <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/118-annual-2019.pdf>. See also *Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse and Neglect and Dependency Cases*. (2016) Eds. Donald N. Duquete, Ann N. Haralambie, and Vivek S. Sankaran. (3rd), 406 ("The best practice is for CPS agencies to carefully consider whether some exceptions to the Fourth Amendment's requirement of a warrant and probable cause exist and, if not, to seek appropriate court authorization").

¹⁶ 42 U.S.C. § 671(a)(15) (2018).

¹⁷ *Id.* *Family First Prevention Services Act: Bill Summary*, First Focus Campaign for Children (Mar. 2018), <https://campaignforchildren.org/wp-content/uploads/sites/2/2016/06/FFCC-Short-Summary-FFPSA.pdf>.

¹⁸ See *infra* at II(b).

¹⁹ *Ms. L v. ICE*, *supra* note 13, at 23.

²⁰ *Ms. L v. ICE*, Case No. 18cv0428 (DMS) (MDD) (S.D. Cal, July 30, 2019) (Plaintiff memorandum in support of motion to enforce preliminary injunction), <https://www.aclu.org/legal-document/ms-l-v-ice-memo-support-motion-enforce-pi>, at 7.

Furthermore, border agents within Customs and Border Protection (CBP) are not equipped nor permitted by law to make determinations of whether a child would experience harm by a parent or legal guardian or about the nexus of a parent or legal guardian's criminal history to possible harm to the child. The experience of Young Center Child Advocates bears that out, as many of the cases referred to them based on criminal history were found to be unsubstantiated and the government reunited those families.²¹ We urge that DHS specifically prohibit categorical separation based on criminal history.

b. Determinations regarding family separation shall be made only by state-licensed child welfare professionals, shall be subject to judicial review by a court of competent jurisdiction, and shall require special training of all entities encountering children and families.

In the child welfare system, the determination to remove a child from their home is often made by state agencies whose personnel are required to have a certain level of training and understanding regarding the importance of family relationships for children and what constitutes a true risk of harm to a child.²² When a state entity decides to remove a child from their home on an emergency basis, multiple states mandate that a court of competent jurisdiction review that determination within days in accordance to the child's best interests, and the agency must prove to the court that removal was and is necessary to prevent harm to the child.²³ Notably, this emergency removal and court review is *not* about parental fitness (which only comes up when the state seeks to terminate parental rights), but rather is solely focused on whether a child would experience harm if they remain with their parent or legal guardian and what, if anything, the child or family needs to prevent that harm. Families arriving at our border should have the same rights to a process of review when they face the possibility of physical separation.

As stated above, CBP border agents do not have the expertise or training to make any determination about whether an accompanying adult poses a substantial risk of harm to a child. Neither should they be given that responsibility. CBP itself states that it has a law enforcement mandate,²⁴ which does not align with the expertise needed to evaluate family relationships to ensure children are safe. The American Bar Association issued a policy on family integrity in 2019 which specifically stated that “determinations of parental fitness and the necessity of removal fall exclusively to state and tribal jurisdiction,” and that the federal government must coordinate with those entities to effectuate separations as part of the child welfare legal process.²⁵

DHS and HHS should hire state-licensed child welfare professionals at the border to do the initial assessment of whether a parent or legal guardian poses a substantial risk of imminent harm to the

²¹ Written Testimony of Jennifer Nagda, J.D., U.S. House of Representatives Committee on Oversight and Reform 5-6 (July 12, 2019), <https://static1.squarespace.com/static/597ab5f3beba60a625aaf45/t/5d2dd3dbac5f4900017798c7/1563284443805/House+Oversight+and+Reform+Testimony+of+Jennifer+Nagda+Young+Center+%281%29.pdf>.

²² Sankaran, *supra* note 14. *See, e.g.*, Ark. Code Ann. § 12-18-1001(a) (2018); Mont. Code Ann. § 41-3-301(1) (West 2017); N.C. Gen. Stat. § 7B-500(a) (2018); Tenn. Code Ann. § 37-1-113(a)(3) (2018).

²³ Sankaran, *supra* note 14. *See, e.g.*, Tex. Fam. Code Ann. § 262.105(a)(3) (requiring a hearing after an emergency removal within one business day).

²⁴ *About CBP*, U.S. Customs and Border Protection, <https://www.cbp.gov/about> (last visited Dec. 14, 2021).

²⁵ American Bar Association House of Delegates, *supra* note 15, at 11.

child. That decision should then be subject to review within the agencies and by a court of competent jurisdiction within days, in accordance with state law.

The lives of immigrant children and their families depend on providers' cultural competency and ability to offer trauma-informed care. DHS and HHS must ensure that both child welfare professionals at the border and state child welfare agencies and family courts are trained on the demographics of children and families migrating to the United States, the specific needs of those children and families, and the right to seek protection in the United States. In particular, these entities need to be trained on the particular rights and needs of Indigenous children and families migrating from Central America. Complete disregard for the historical and present-day genocide, marginalization, and erasure of this population has resulted in serious maltreatment at the U.S. border, including the death of Indigenous children in CBP custody.²⁶ It is critical that DHS and HHS partner with Indigenous organizations and communities regarding the needs of Indigenous families arriving at the border, including cultural competency, language services, and understanding of Indigenous peoples' unique legal rights to ensure that families are treated humanely and are not subject to paternalistic assumptions of parental fitness.²⁷ The government should incentivize state child welfare agencies and family courts to hire specific staff to handle cases that intersect with immigration and ensure that staff and judges understand the circumstances of families arriving at the border, including the most common root causes of migration, the trauma of the migration journey, the right to seek protection at the border.

c. In the rare situation in which family separation occurs, DHS shall provide notice and due process to children and families.

As explained earlier, there is a Fifth Amendment right to family integrity, one that the government cannot deny without due process.²⁸ In proceedings before family court regarding separation and allegations of abuse or neglect, parents have specific rights, including rights to:

- an explanation of the reason for separation
- a hearing before the government removes their children
- legal representation
- knowledge and suggestion of a child's alternative placement
- visitation and communication
- appeal, and
- swift reunification where the allegation is found to be unsubstantiated.²⁹

²⁶ *Immigration*, International Mayan League, <https://www.mayanleague.org/immigration> (last visited Dec. 15, 2021). *Deaths of Indigenous Children at the Border Amplifies the Need for Policy Change*, Indian Law, <https://indianlaw.org/story/indigenous-children-border-deaths-amplifies-need-policy-change> (last visited Dec. 15, 2021).

²⁷ For specific recommendations from Indigenous communities, see *Indigenous Peoples' Rights to Exist, Self Determination, and Due Process in Migration*, Submission to the United Nations Universal Period Review of the United States of America, Indigenous Alliance Without Borders, International Mayan League (May 2020), https://www.indigenousalliance.org/files/ugd/7c2cd7_8fba30c64dd8470a900718d182b629d8.pdf.

²⁸ *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981) (holding that parents have a due process right to a fundamentally fair procedure that may require the appointment of counsel).

²⁹ Jan McCarthy et al., *A Family's Guide to the Child Welfare System*, Georgetown University Center for Child and Human Development 86-89 (2005), https://gucchd.georgetown.edu/products/AFamilysGuide_English.pdf. *Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse and Neglect and Dependency Cases*, *supra* note 15, at 410-418. See also U.S. Department of Health and Human Services, Administration for Children and Families, Information

In the rare case that separation at the border occurs based on the standard outlined above, children and families at our border also have a constitutional right to due process. Guidance should require DHS to explain, in person and in writing in each family members' best language, the reason for separation and each family members' rights. DHS and HHS must also track family relationships, let children and caregivers know the whereabouts of their family members for the duration of separation, and allow for regular communication where it is in the best interest of the child. Guidance should also require DHS and HHS to provide appointed counsel for children and families who have a review of their separation and outline processes to facilitate expeditious reunification where a separation was erroneous.

III. End other deterrence-based policies that result in family separation.

President Biden has made it the policy of his Administration “to respect and value the integrity of families seeking to enter the United States.”³⁰ While the President’s Executive Order focuses on separation under the Trump Administration’s zero-tolerance policy, the order explicitly covers “any other related policy, program, practice, or initiative resulting in the separation of children from their families at the United States-Mexico border” between 2017 and 2020.³¹ Similarly, the request for input states that the Task Force welcomes thoughts related to the zero-tolerance policy “as well as policies, procedures, or regulations that may minimize the separation of migrant parents and legal guardians and children entering the United States, consistent with law.”³² We urge the Task Force to include in its recommendations four deterrence-based policies that resulted in family separation during the time frame outlined in the executive order, some of which regrettably continue under this Administration: prosecutions for unauthorized entry, detention of asylum seekers and other migrants, the Remain in Mexico policy (RMX, officially named the “Migrant Protection Protocols”), and expulsions under Title 42 of the U.S. Code.

a. Prosecutions for Unauthorized Entry

Prosecution of asylum seekers for unauthorized entry was the cornerstone of the 2018 family separation policy. Then-Attorney General Jeff Session’s memorandum to U.S. attorneys mandated the prosecution of every individual who crossed the border without authorization under 8 U.S.C. § 1325(a).³³ Indiscriminate prosecution in this manner violates both U.S. and international law allowing an individual to seek asylum at our border regardless of where they cross and whether they cross without authorization. U.S. law guarantees every person arriving in the United States the opportunity to seek asylum, “whether or not at a designated port of arrival.”³⁴ The Refugee

Memorandum ACFY-CB-IM-21-06 (Jan. 14, 2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/im2106.pdf> (urging state, tribal and territorial agencies to use federal funding to provide high quality legal representation to children, youth and parents in the child welfare system).

³⁰ Executive Order on the Establishment of Interagency Task Force on the Reunification of Families, The White House (Feb. 2, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-the-establishment-of-interagency-task-force-on-the-reunification-of-families/>

³¹ *Id.*

³² 86 FR 70514.

³³ *Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a)*, *supra* note 5.

³⁴ 8 U.S.C. § 1158(a)(1). *See also* 8 U.S.C. § 1101(a)(42)(A) (“[t]he Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien’s status, to apply for asylum. . . .”).

Convention, to which the U.S. is bound,³⁵ prohibits states parties from imposing penalties on asylum seekers who enter the country without authorization.³⁶ DHS and the Department of Justice (DOJ) should adhere to our international obligations and prevent future harm to children by issuing guidance prohibiting the prosecution of individuals for unauthorized entry, particularly those who cross the border seeking asylum.

b. Detention

Prolonged detention of children is prohibited under international law³⁷ and a 2015 court order in the Flores Settlement Agreement, which prohibits detention of children accompanied by their parent or legal guardian for longer than 20 days.³⁸ Unfortunately, multiple Administrations have detained families who cross the border.³⁹ Under the Trump administration, families faced the prospect of family separation when the government detained children for longer than 20 days and chose to not release children with their parents.⁴⁰ Family detention undermines the physical and mental well-being of children and their parents and strains parent-child relationships.⁴¹ Separation after these inhumane conditions compounds that trauma that both children and parents have experienced, further disrupting family bonds and denying children a caregiver who can most effectively help them manage their stress and emotions. While DHS currently has no families in detention, the agency characterized this change as “operational” and has not committed to not detaining families in the future.⁴² DHS should issue an official policy eliminating family detention in favor of community-based case management for families going through their asylum case, including family services where a child welfare professional has identified that a family needs them.⁴³ Additionally, the President should indicate the Administration’s position to eliminate family detention by removing any requests to fund the practice in the FY2023 Presidential Budget.

³⁵ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987).

³⁶ 1951 Convention Relating to the Status of Refugees art. 31(1), 189 U.N.T.S. 137, July 28, 1951.

³⁷ *UN Rights Chief ‘Appalled’ By US Border Detention Conditions, Say Holding Migrant Children May Violent International Law*, UN News (July 8, 2019), <https://news.un.org/en/story/2019/07/1041991>.

³⁸ *Flores v. Lynch*, Case No. CV 85-04544-DMG-AGR (C.D. Cal, Aug. 21, 2015).

³⁹ Ingrid Eagly, Steven Shafer, and Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, American Immigration Council 6-8 (Aug. 2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/detaining_families_a_study_of_asylum_adjudication_in_family_detention_final.pdf.

⁴⁰ Camilo Montoya-Galvez, *Migrant Mom Faces Impossible Choice: Let Her Son Be Released Without Her Or Stay in ICE Detention Together*, CBS News (July 24, 2020), <https://www.cbsnews.com/news/migrant-mom-faces-impossible-choice-let-her-son-be-released-without-her-or-stay-in-ice-detention-together/>.

⁴¹ *Locking Up Family Values, Again*, Lutheran Immigration and Refugee Service and The Women’s Refugee Commission (Oct. 2014), https://www.lirs.org/assets/2474/lirswrc_lockingupfamilyvaluesagain_report_141114.pdf. Brief for the American Academy of Child and Adolescent Psychiatry and the National Association of Social Workers, *Flores v. Lynch*, Case No. 2:85-cv-04544-DMG-AGR (9th Cir., Feb. 23, 2016), available at: <https://www.humanrightsfirst.org/sites/default/files/HRFFloresAmicusBrief.pdf>.

⁴² Andrea Castillo, *Biden Administration Halts Immigration Family Detention for Now*, Los Angeles Times (Dec. 17, 2021), <https://www.latimes.com/politics/story/2021-12-17/adults-only-biden-administration-repurposes-immigrant-family-detention-centers>.

⁴³ *Community Support for Migrants Navigating the U.S. Immigration System*, American Immigration Council and Women’s Refugee Commission (Feb. 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/community_support_for_migrants_navigating_the_us_immigration_system_0.pdf.

c. *Remain in Mexico*

Another policy that has resulted in family separation is the Remain in Mexico program, officially named the “Migrant Protection Protocols.”⁴⁴ Approximately 16,000 children with their parents, including nearly 500 infants, were returned to Mexico under the program.⁴⁵

This Administration has acknowledged the harms of RMX in multiple memos to terminate the program.⁴⁶ At least 341 publicly reported cases of harm under the program were children who were kidnapped or almost kidnapped.⁴⁷ Additionally, families had no real mechanisms to seek safety in the United States after experiencing harm in Mexico.⁴⁸ First Focus joined other child advocacy partners to outline the harms of RMX for children.⁴⁹ It is no surprise, then, that parents felt forced to send their children alone to the border to find safety, as unaccompanied children were exempt from the program.⁵⁰ Public reports found that at least 350 children who were previously in RMX were later referred to HHS as unaccompanied.⁵¹ In many cases, these separations were prolonged.⁵²

While we understand that the Administration is currently in litigation regarding the Remain in Mexico policy and has reimplemented it under a court order, we are alarmed that DHS has expanded the program beyond its original parameters to include all asylum seekers from the Western Hemisphere, including Haitians and other Black asylum seekers who face racism and discrimination in Mexico.⁵³ We urge the Administration to take all necessary steps to completely end the program.

⁴⁴ *Migrant Protection Protocols*, U.S. Department of Homeland Security (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

⁴⁵ *Delivered to Danger: U.S. Government Sending Asylum Seekers and Migrants to Danger*, Human Rights First (Feb. 19, 2021), <https://www.humanrightsfirst.org/campaign/remain-mexico>.

⁴⁶ *Termination of the Migrant Protection Protocols Program*, Memorandum from Secretary Alejandro N. Mayorkas, U.S. Department of Homeland Security (June 1, 2021), https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf. *Termination of the Migrant Protection Protocols*, Memorandum from Secretary Alejandro N. Mayorkas, U.S. Department of Homeland Security (Oct. 29, 2021), https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-memo.pdf.

Explanation of the Decision to Terminate the Migrant Protection Protocols, U.S. Department of Homeland Security (Oct. 29, 2021), https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-justification-memo-508.pdf.

⁴⁷ *Id.*

⁴⁸ Camilo Montoya-Galvez, “*Leave Me in a Cell*”: *The Desperate Pleas of Asylum Seekers Inside El Paso’s Immigration Court*, CBS News (Aug. 11, 2019), <https://www.cbsnews.com/news/remain-in-mexico-the-desperate-pleas-of-asylum-seekers-in-el-paso-who-are-subject-to-trumps-policy/>.

⁴⁹ Brief for Amici Curiae Young Center for Immigrant Children’s Rights, et al. in Support of Appellant and Reversal, *Texas v. Biden*, Case No. 21-10806 (5th Cir., Sept. 27, 2021), available at https://static1.squarespace.com/static/597ab5f3beba0a625aaf45/t/61531cee91a6897aca74c12/1632836847044/2021_09_27_00516031522+Amicus+Brief.pdf.

⁵⁰ *Delivered to Danger*, *supra* note 45.

⁵¹ Priscilla Alvarez, *At Least 350 Children of Migrant Families Forced to Remain in Mexico Have Crossed Over Alone to U.S.*, CNN (Jan. 24, 2020), <https://www.cnn.com/2020/01/24/politics/migrant-children-remain-in-mexico/index.html>.

⁵² Brief for Amici Curiae Young Center for Immigrant Children’s Rights, et al. in Support of Appellant and Reversal, *supra* note 49.

⁵³ Robert Silvers, Under Secretary for Office of Strategy, Policy, and Plans, U.S. Department of Homeland Security *Guidance Regarding the Court-Ordered Reimplementation of the Migrant Protection Protocols* (Dec. 2, 2021), https://www.dhs.gov/sites/default/files/publications/21_1202_plcy_mpp-policy-guidance_508.pdf.

d. Title 42 Expulsions

Lastly, children have been separated from their families under the Title 42 expulsions program. Even though experts from the Centers for Disease Control and Prevention opposed the policy when it was first contemplated⁵⁴ and public health experts have repeatedly stated that there is no public health basis for the policy,⁵⁵ the Administration continues to misuse Title 42 of the U.S. Code to summarily return asylum seekers to Mexico or their home country without sufficient evaluation of whether they would be safe upon return. Approximately 29,000 children in families, 9,000 under the age of five and 600 under the age of one, have been expelled,⁵⁶ including more than 2000 children to Haiti at a time when the nation faces overlapping political crises and natural disasters.⁵⁷ Human Rights First has tracked over 8,700 cases of violence against asylum seekers expelled under Title 42 since President Biden took office.⁵⁸ Similarly to the Remain in Mexico policy, unaccompanied children are exempt from Title 42 expulsions, leaving parents no choice but to send their children to the border alone to ensure their safety.⁵⁹ Public reports estimate that over 2000 children previously expelled returned to the border by themselves between January 20 and April 5, 2021.⁶⁰ We urge the Administration to end expulsions under Title 42 and resume asylum processing at the border.

IV. Put in place standards, processes, and entities to ensure all government policies are based on a “best interests of the child” standard.

a. Adopt a “Best Interests of the Child” Standard for all immigration decisions and develop child impact statements for all immigrations policies to implement that standard.

A “best interests of the child” standard is one of many safeguards necessary to ensure that government policies, including immigration policies, consider the rights and well-being of children. A best interests standard would ensure that children’s safety, views, liberty, health, development and, importantly, family unity, are considered in immigration policy.⁶¹ Child impact statements are an

⁵⁴ Camilo Montoya-Galvez, *How Trump Officials Used COVID-19 to Shut U.S. Borders to Migrant Children*, CBS News (Nov. 2, 2020), <https://www.cbsnews.com/news/trump-administration-closed-borders-migrant-children-covid-19/>.

⁵⁵ *1300+ Medical Professionals From 49 State and Territories Call on CDC to End “Junk Science” Border Expulsion Policy*, Physicians for Human Rights (Oct. 28, 2021), <https://phr.org/our-work/resources/u-s-medical-professionals-demand-cdc-end-title-42/>.

⁵⁶ *“Illegal and Inhumane”: Biden Administration Continues Embrace of Trump Title 42 Policy as Attacks on People Seeking Refuge Mount*, Human Rights First 3 (Oct. 2021), <https://www.humanrightsfirst.org/sites/default/files/IllegalandInhumane.pdf>.

⁵⁷ *Returns of Migrants and Reception Assistance in Haiti*, International Organization for Migration Haiti (Dec. 19, 2021), https://reliefweb.int/sites/reliefweb.int/files/resources/factsheet_returns_-_19_december_2021_2_1.pdf.

⁵⁸ *A Shameful Record: Biden Administration’s Use of Trump Policies Endangers People Seeking Asylum*, Human Rights First 2, 4 (Jan. 2022), <https://www.humanrightsfirst.org/sites/default/files/ShamefulRecord.pdf>.

⁵⁹ *Id. Neither Safety Nor Health: How Title 42 Expulsions Harm Health and Violate Rights*, Physicians for Human Rights (July 2021), <https://phr.org/wp-content/uploads/2021/07/PHR-Report-United-States-Title-42-Asylum-Expulsions-July-2021.pdf.pdf>.

⁶⁰ Nicole Sganga and Camilo Montoya-Galvez, *Over 2,100 Children Crossed Border Alone After Being Expelled with Families to Mexico*, CBS News (May 7, 2021), <https://www.cbsnews.com/news/migrant-children-left-families-asylum-border/>.

⁶¹ Jennifer Nagda and Maria Woltjen, *Best Interests of the Child Standard: Bringing Common Sense to Immigration Decisions*, Big Ideas 2015 – Pioneering Change: Innovative Ideas for Children and Families 11 (Mar. 2015), <https://firstfocus.org/wp-content/uploads/2015/04/Best-Interests-of-the-Child-Standard.pdf>.

evaluation tool to ensure that policies adhere to the best interests standard.⁶² Had such a standard and evaluation tool been in place under the Trump Administration, DOJ and DHS would have been much less likely to implement a policy like zero-tolerance. At the very least, the agencies would have had to create a written record of the impact of the zero-tolerance policy on children’s safety, family unity, health, and development, and provide written justification for why they proceeded with a policy they knew would inflict such harm on children.

Through an executive order, President Biden should adopt a “best interests of the child” standard and require that all agencies assess each regulation, policy, and program for its impact on children’s rights and well-being. Child impact statements should be developed in consultation with experts in children’s issues, like families and children themselves, to ensure consideration of the best interests standard, and should be made publicly available for feedback from the public. Where policies involve coordination with other agencies, child impact statements should include consultation with those agencies. Government officials should use these child impact statements to determine whether a policy moves forward—where a policy would not advance the best interests of children under any of the factors above, the agencies must examine alternative policies to ensure that all factors of children’s best interests are advanced.

b. Establish a White House Office or Interagency Task Force on Children and support the creation of an Independent Children’s Commissioner.

Family separation was an interagency policy: it was initiated by DOJ, implemented by DHS, and involved HHS programs. While the previous Administration used interagency coordination to intentionally harm children, this Administration can use high-level interagency coordination and alignment for the good of children and put in place mechanisms for a child-focused review of all immigration policies. We applaud the Administration for establishing the Family Reunification Task Force and believe that a similar, permanent mechanism should be in place to ensure continued coordination of policies that advance children’s rights and well-being. We therefore urge the Administration to create a White House Office or Interagency Task Force on Children to coordinate policy development and programs that impact children across various agencies, including those affecting immigrant and refugee children.⁶³

The family separation policy also made clear the need for independent oversight and review of immigration policies from a child-focused lens. We also urge the Administration to support the creation of an Independent Children’s Commissioner, who would examine policy choices and make recommendations across government regarding children’s rights and well-being.⁶⁴ During zero-tolerance, career agency staff protested the policy based on its definitive harm to children but were

⁶² *Fact Sheet: Child Impact Statements*, First Focus on Children (Sept. 2021), https://firstfocus.org/wp-content/uploads/2021/09/FACT-SHEET_ChildImpactStatements.pdf.

⁶³ Daniella Gatale, et al., *Federal Leadership for Children and Youth: Charter for a White House Office and Conference*, Nemours Children’s Health System (Nov. 2020), <https://www.nemours.org/content/dam/nemours/wwwv2/childrens-health-system/documents/white-house-office-on-children-and-youth-charter.pdf>.

⁶⁴ Oliver Kim, *Establishing a Children’s Commissioner: Lessons from Australia on Creating an Oversight Body for Children’s Issues*, First Focus on Children (Oct. 31, 2019), https://firstfocus.org/wp-content/uploads/2019/10/WhitePaper-EstablishingChildrensCommissioner_OliverKim.pdf.

ignored.⁶⁵ A high-level, independent body entirely dedicated to children would have the authority and mandate to publicly raise the alarm about policies that harm children or fear of career consequences. Such a body could also perform investigations where harm is done to children, ensuring accountability and redress. Together, these entities would ensure that all areas of children’s well-being, including family unity, are integrated into immigration policy and other issues of importance to children.

V. Conclusion

As President Biden has stated, family separation was a “human tragedy,”⁶⁶ a policy of intentional cruelty to prevent families’ brave and lawful decision to seek safety at our border. Preventing family separation from ever happening again requires our government to pursue redress and accountability for separated families; issue guidance based on rights to family unity and due process; eliminate all other deterrence-based policies that result in family separation; and put in place standards, processes, and entities to ensure all government policies are based on a “best interests of the child” standard.

Thank you for the opportunity to submit a comment in response to the Request for Public Input. Please do not hesitate to contact Miriam Abaya, Vice President for Immigration and Children’s Rights, at miriama@firstfocus.org for more information.

Sincerely,

A handwritten signature in blue ink that reads "Bruce Lesley". The signature is written in a cursive, slightly slanted style.

Bruce Lesley
President

⁶⁵ Colleen Long, *Officials Who Oversaw Migrant Kids: Separation Causes Trauma*, AP (Feb. 7, 2019), <https://apnews.com/article/health-north-america-donald-trump-immigration-trauma-99591d8bc3b043e2af6fa9207e328ae6>.

⁶⁶ Executive Order on the Establishment of Interagency Task Force on the Reunification of Families, *supra* note 30.